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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 92-0749 CSET
Controlled Substance Excise Tax
For The Tax Period Of August 13, 1992

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ISSUES

I. Controlled Substance Excise Tax - Liability

Authority: Indiana Code § 6-7-3-5, IC 6-8.1-5-1(b);
Bryant v. Indiana Department of State Revenue, 660 N.E.2d 290 (Ind.1995);
Hayse v. Indiana Department of State Revenue, 660 N.E.2d 325 (Ind.1995);
Baily v. Indiana Department of State Revenue, 660 N.E.2d 322 (Ind.1995);
Clifft v. Indiana Department of State Revenue, 660 N.E.2d 310 (Ind.1995);
Hall v. Indiana Department of State Revenue, 660 N.E.2d 319(Ind.1995)

The taxpayers protest assessment of controlled substance excise tax.

STATEMENT OF FACTS

On August 7, 1992, members of the Indiana State Police, flying in an Indiana National Guard helicopter on a marijuana eradication mission, spotted two plots which appeared to contain marijuana. The suspected marijuana grew in a partially wooded and rather over grown field south and east of the taxpayers' residence. The police reported that there were tracks leading from the general area of the residence to the marijuana plots. The helicopter immediately landed on taxpayers' property and the police left the aircraft. They confronted the taxpayers, who are joint owners of the property as husband and wife, and began questioning them about the marijuana in the adjacent field. Taxpayer's told the police that the adjacent field, in which the police spotted the suspected marijuana, was not their property, but was owned by another person, who had an easement across

taxpayer's property to reach his field. A well-maintained fence with a gate separated taxpayers' property from the property on which the suspected marijuana grew. The police arrested the taxpayers and obtained a search warrant for taxpayer's residence and property. The search failed to produce any marijuana, any implements for the manufacture or delivery of marijuana or paraphernalia associated with the marijuana use. The police removed the suspected marijuana from the adjacent field. It was later tested, weighed and found in fact to be marijuana weighing 72,122.4 grams. The Department issued a jeopardy assessment against the taxpayers on November 6, 1992, because no Controlled Substance Excise Tax ("CSET") had been paid on the marijuana. The taxpayers, by counsel, timely protested the assessment. An administrative hearing was conducted on November 18, 1998 where taxpayers, with counsel, presented additional evidence in support of their contention that they are not liable for the tax.

I. <u>Controlled Substance Excise Tax</u> - Liability

DISCUSSION

In Indiana, the manufacture, possession or delivery of marijuana is taxable, *See* IC 6-7-3-5. Our Supreme Court has found this imposition of tax constitutionality sound. *See Bryant v. Indiana Department of State Revenue*, 660 N.E.2d 290 (Ind.1995); *Hayse v. Indiana Department of State Revenue*, 660 N.E.2d 325 (Ind.1995); *Baily v. Indiana Department of State Revenue*, 660 N.E.2d 322 (Ind.1995); *Clifft v. Indiana Department of State Revenue* 660 N.E.2d 310 (Ind.1995); *Hall v. Indiana Department of State Revenue*, 660 N.E.2d 319(Ind.1995). The Department assessed tax against the taxpayers and demanded payment. Indiana law specifically provides that notice of a proposed assessment is prima facie evidence that the Department's claim for the unpaid tax is valid, IC 6-8.1-5-1(b). The taxpayers, who timely protested the tax assessment, now bear the burden of proving that the proposed assessment is wrong, *Id*.

Under the above stated statutory test, the Department is now only called on to make a narrow factual decision. That decision is whether taxpayers showed, by a preponderance of evidence, that they did not manufacture, possess or deliver the marijuana seized from the property adjacent to theirs. The Department does not judge whether the police had probable cause for the search, seizure or for any action taken during the course of the police investigation. That is not within the purview of the Department's administrative authority, but is left to another competent tribunal.

Because this matter involves adjacent properties in rural Indiana, a brief description of how the real estate lays is an important starting point for the Department's analysis. As the facts above state, the police seized a quantity of marijuana from a field. That field was a ten (10) acre square parcel of real estate adjoining the southern boundary of taxpayers' ten (10) acre square parcel. Taxpayers' real estate lies in the northeast corner of the quarter quarter section; the field containing the marijuana lies immediately to the south in the southeast corner of the quarter quarter section. The taxpayer's driveway is the easiest, but not the sole means to the state highway to the southwest. Because the driveway is the main access to this half of the quarter section, there is an easement

appurtenant to the field where the marijuana was cultivated; taxpayers' real estate is the servient tenement. Because the easement provided access from taxpayers' real estate to the field with marijuana in it, taxpayers may have accessed the marijuana as well. But mere accessibility is not the standard for imposition of the CSET, it attaches where there is manufacture, possession or delivery of a control substance.

The taxpayers showed considerable evidence at hearing to support their burden. First, taxpayer showed with police documents, that the police failed to find any marijuana on the real estate owned by the taxpayers. The marijuana plants and some dried marijuana were all found on the adjoining real estate. There was no dried, process or packaged marijuana in the taxpayer's home, barns or on them personally. There were no scales for weighing the dried marijuana. No ledgers showing sales or production. No specialty growing products for the marijuana or any publications regarding growing marijuana. There were no pipes, papers or other paraphernalia associated with the use of marijuana. In fact, the taxpayers voluntarily submitted to drug screening tests on August 8, 1992. The test results for both the taxpayers were negative for all controlled substances. Taxpayers' also took a polygraph examination on August 19, 1992, the results of which indicated no specific reactions indicative of deceptive reaction.

Secondly, Taxpayers also produced a map, several photographs of their real property and the real estate where the marijuana grew as well as an aerial photograph of the entire area. With these visual aids, the taxpayers showed the relation of their property to the property where the marijuana grew. They also showed where the marijuana grew in the adjacent field and the view of that area from their property. They also showed the easement across their property to the adjacent field and that there were other ways to access the field. The photographs also reveal that the taxpayers' property is neat and well kept and is separated from the adjacent property by a well-maintained fence with a gate in it. The adjacent property where the marijuana grew was rather over grown and the fence on its southern boundary also had a gate through which access could be gained.

Thirdly, the taxpayers showed that they were not the owners of the property where the marijuana was found, nor were the taxpayers on the real estate when the police arrived. In fact, taxpayers provided evidence, in the form of an affidavit signed by the actual owner of the real estate where the marijuana grew, showing that another person had the right to use that property. The owner admitted in the affidavit that he had not inspected the real estate while the other person used it. Additionally, taxpayers provided a certified copy of the conviction for cultivating marijuana of the person who was using the property where the police found the marijuana.

The taxpayers maintain that they were not aware of what was happening on their neighbor's property. The fact that an easement existed crossing taxpayer's land to the property where the marijuana grew, reasonably accounts for any track or paths that may have existed. Taxpayers also showed through photographs that other tracks and paths lead from the plots were the marijuana grew to other points of egress to the property.

Taxpayers have provided considerable evidence to advance its position that they did not manufacture, deliver or possess the marijuana on which they were taxed. Although no single piece of evidence produced by the taxpayers proves their burden, taken in the aggregate, the scale tips in their favor.

FINDING

The Department sustains the taxpayers' protest.